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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

Nos. 808 and 822

FEDERAL POWER COMMISSION, *Petitioner*, vs. SOUTHERN CALIFORNIA EDISON COMPANY and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Respondents.*	No. 808
CITY OF COLTON, CALIFORNIA, *Petitioner*, vs. SOUTHERN CALIFORNIA EDISON COMPANY and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Respondents.*	No. 822

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR SOUTHERN CALIFORNIA EDISON COMPANY IN OPPOSITION

Southern California Edison Company prays that the petitions filed on behalf of the Federal Power Commission

and the City of Colton, California, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit be denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 310 F.2d 784. The record has been filed herein by the Federal Power Commission.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petitions.

QUESTIONS PRESENTED

(1) Whether the Federal Power Commission may extend federal regulation to the rates charged by Southern California Edison Company to the City of Colton, California: (a) where all electric energy sold by Edison to its customers, all of whom are in California, was generated in California except for such energy as was purchased by Edison from the United States at rates fixed pursuant to the Boulder Canyon Project legislation; (b) where, therefore, the subsequent sale of such out-of-state energy, if any, by Edison to Colton for resale and use within that community was of concern only to, and has been fully regulated by, the State of California; and (c) where Congress expressly stated that federal jurisdiction is "to extend only to those matters which are not subject to regulation by the states." Federal Power Act Section 201(a), 16 U.S.C. 824(a).

(2) Whether the Federal Power Commission may regulate the rates charged by Edison to Colton, where such regulation would encroach upon subject matter specifically left to regulation by the states under the Boulder Canyon Project Act, 43 U.S.C. 617.

(3) Whether the Federal Power Commission's finding that some out-of-state energy was delivered by Edison to Colton is supported by substantial evidence in the record.

(4) Whether federal jurisdiction over the sale of electric energy by Edison to Colton is prevented by the "local distribution" proviso of Section 201(b) of the Federal Power Act, 16 U.S.C. 824(b).

The Court of Appeals for the Ninth Circuit passed only upon the first of these questions, specifically reserved judgment upon the second and third, and likewise did not pass upon the fourth question. It should be noted that a finding adverse to petitioners on *any one* of these four questions is sufficient in itself to sustain the judgment of the Court below.

The following additional questions, though not finally determinative of regulatory jurisdiction, were raised below but did not have to be decided by the Court of Appeals. They would remain to be considered only if the judgment below were to be set aside.

(5) Whether the Federal Power Commission erred in holding that it had no discretion to abstain from taking jurisdiction over *de minimis* sales of electric energy in interstate commerce.

(6) Whether the Federal Power Commission erroneously held that Section 205(d), 16 U.S.C. 824d(d), of the

Federal Power Act required that Edison refund certain charges collected from Colton.

(7) Whether the Federal Power Commission acted arbitrarily and in excess of its lawful authority and discretion in ordering the effective filing date for Edison's rate schedule to be retroactive to 1954.

(8) Whether the Federal Power Commission erred by requiring the filing of rates that are unreasonable, unfair, discriminatory, and preferential, in violation of Section 205 of the Federal Power Act, and are confiscatory, in violation of the Fifth Amendment of the United States Constitution.

(9) Whether the Federal Power Commission erred by refusing, upon application for rehearing, to receive and consider evidence that the basis asserted for federal jurisdiction no longer existed and rendered the case moot.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act, the Natural Gas Act, and the Boulder Canyon Act are set out in the appendices to the petitions.

STATEMENT

This case involves the competing claims of the Public Utilities Commission of the State of California (PUC) and the Federal Power Commission (FPC) to regulate a sale of electric energy by Southern California Edison Company (Edison) to the City of Colton, California

(Colton). Edison's sales to Colton have been regulated by the PUC since the latter's creation in 1911.. FPC claims the right to extend its jurisdiction to these sales and oust the California Commission.

Edison serves portions of central and southern California. It has no customers outside of California. Edison operates eight steam generating plants located along the Pacific coast, one near Colton, a large hydroelectric development in the High Sierra and small hydro plants in the San Bernardino-Redlands area. All of these facilities are located in California.

The only out-of-state energy purchased by Edison is part of the production of Hoover Power Plant. The Hoover Power Plant was constructed by the United States on the Colorado River near Boulder City, Nevada, pursuant to the Boulder Canyon Project Act. The Metropolitan Water District of Southern California (MWD) is entitled to the largest portion of Hoover energy. In 1945 Edison entered into a contract with the United States to purchase Hoover energy which MWD did not use. This energy reaches Edison's system at its Highgrove Substation in California from the MWD line at Hayfield, California. The receipts of such energy have diminished as MWD has steadily increased its pumping to meet expanding water needs. In 1958 the energy so received was equal to about 1% of Edison's system generation. In 1959, it amounted to about ⅕ of 1%.

The point has now been reached, as stated in Edison's petition for rehearing before the Federal Power Commission, that no further receipts of energy from this source, except for possible emergency or disaster condi-

tions, can reasonably be anticipated (R. 883-884). Yet this is the energy upon which FPC's claim to jurisdiction rests.

Transmission lines interconnect Edison's major energy sources through 20 transmission substations. Each of these transmission substations in turn serves several distribution substations located in each of several hundred local communities served by Edison.

Colton has no generating facilities and has always purchased all of its electric requirements from Edison. The California PUC has always regulated all of Edison's rates, including those to Colton. In 1954 and in 1957 the California PUC authorized general rate increases, including the resale rate applicable to Colton. Colton actively opposed these increases but did not question PUC jurisdiction in either proceeding.

Subsequently, however, Colton initiated this separate proceeding before the FPC in the hope of invalidating the PUC rates found to be reasonable and of recovering money collected thereunder.

After hearing, the presiding examiner for the FPC granted motions to dismiss Colton's complaint on the ground that FPC jurisdiction was precluded by statutes relating to the Boulder Canyon Project (26 F.P.C. 238).

Thereafter, the Commission reversed the examiner on that ground, made findings in its own favor and entered its Order Determining Jurisdiction (R. 837-869).[1]

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[1]Edison made the filings required by the order under review and billed Colton at both the FPC and PUC rates. Colton elected to pay the FPC rate which was the lower. However, after an

Petitions for rehearing (R. 870-891) challenged each of those findings, and also raised the issue of mootness. Notwithstanding these circumstances the FPC denied rehearing on September 14, 1961 (R. 892-897). Appeal was then taken to the Court of Appeals for the Ninth Circuit.

The Ninth Circuit reached the same result as the presiding examiner of FPC, concluding that FPC had no jurisdiction. However, the court chose a different ground for so concluding. It expressly passed consideration of the Boulder Canyon legislation, and also the question whether any out-of-state energy actually reached Colton, and held that in any event the jurisdiction of the FPC does not extend to the rates charged by Edison to Colton because such extension would encroach upon subject matter specifically left to regulation by the state commission under Section 201(a) and (b) of the Federal Power Act. As noted above other issues did not need to be passed upon.

The Court of Appeals observed that Edison is engaged in serving only customers in California, and all of its sources of electric energy are located in California except for the small portion it received from Hoover under contract with the United States. The rate which Edison pays for such Hoover power is under the control of the United States and is fixed by Edison's contract with the United States. Because of this fact, and the additional fact that Edison does not itself sell any energy outside California, the court below found (and that finding is not challenged by petitioners) that no state other than Cali-

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increased rate filed by Edison with FPC had become effective (assuming FPC jurisdiction) on June 1, 1962, subject to refund. Colton advised Edison that it would elect to pay the bill based upon the PUC rate which is now the lower.

fornia could be affected in any way by the regulation of the rates charged by Edison in the subsequent sale to Colton, even if it were assumed that some Hoover energy reached Colton. Therefore, the Federal Power Act by its own terms precluded FPC jurisdiction.

ARGUMENT

THE WRIT SHOULD BE DENIED

I. NO CONFLICT OF DECISION

The court below recognized that *most* sales at wholesale in interstate commerce affect the interests of more than one state so that regulation thereof by any one state could prejudice the interest of another state and would be an undue burden on interstate commerce in violation of the interstate commerce clause. *Public Utilities Commission v. Attleboro Steam and Electric Co.* 273 U.S. 83 (1927). These were the "Attleboro gap" sales over which Congress gave the FPC regulatory control when it enacted Part II of the Federal Power Act in 1935. But Congress was at the same time careful and explicit in preserving to the states whatever regulation over interstate commerce they could constitutionally exercise prior to the Act. Thus, it would be arbitrary to conclude that *all* wholesale sales in interstate commerce must necessarily come under FPC jurisdiction. If the wholesale sale in question could be the concern of only one state, the constitutional right of that state to continue to regulate it was expressly preserved by Congress when it stated that federal jurisdiction is "to extend only to those

matters which are not subject to regulation by the states." Federal Power Act Section 201(a).

The court below took full note of the fact that once there has been a federally regulated sale for resale of energy which is to be consumed wholly within one state, subsequent sales of that energy within that state can affect the interest of only that state. Accordingly the court concluded that where, as here, the original sale for interstate transmission was under federal control and no other state could be concerned or affected in any way by regulation of the subsequent transaction, the Federal Power Commission had no authority to regulate such subsequent transaction, specifically the rates at which Edison sells energy to the City of Colton.

There is no conflict with any prior decision of this Court. Petitioners in support of their claim of conflict of decision point to certain broad statements in prior decisions to the effect that the Federal Power Act and Natural Gas Act placed all wholesale sales in interstate commerce beyond the reach of state regulation. Petitioners claim such generalizations to be controlling apart from their factual context. The cases cited by petitioners relate, however, with a single exception noted below, to jurisdiction over an initial sale for export (where the producing and consuming states had conflicting interests in the rates to be charged) or to some aspect of FPC jurisdiction other than rates. The court below was fully cognizant of these cases and did not question their correctness or undertake to make a holding inconsistent with them.

Thus, *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498 (1942), *Federal Power Com-*

mission v. East Ohio Gas Co., 338 U.S. 464 (1950), and *Hartford Electric Light Co. v. Federal Power Commission*, 131 F.2d 953 (CA2 1942), *cert. denied*, 319 U.S. 741 (1943) were concerned with the Commission's jurisdiction over accounting and securities. *Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana*, 332 U.S. 507 (1947) and *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission*, 341 U.S. 329 (1951) were concerned with the state's power to regulate retail sales. *United States v. Public Utilities Commission*, 345 U.S. 295 (1953) and *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954) imposed Commission jurisdiction over certain sales for resale for export and consumption in a state other than the state of production. *Wisconsin-Michigan Power Company v. Federal Power Commission*, 197 F.2d 472 (CA7 1952), *cert. denied*, 345 U.S. 934 (1953) and *Pennsylvania Water and Power Co. v. Federal Power Commission*, 343 U.S. 414 (1952) concerned the first sale for resale of energy generated in a state other than the state of consumption. *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626 (1945) imposed federal jurisdiction over a sale for resale where the gas involved was thereafter distributed and sold in more than one state.

It is apparent that none of these cases are in conflict with the decision of the Ninth Circuit below. The statements in those cases must of course be read and understood in their proper context, and any dicta of contrary import in them must be recognized only as such. The only case cited by petitioners which involved a sale for resale subsequent to a previously regulated sale by

federal authority, and where the ultimate consumption of energy may all have been within the same state is *Wisconsin v. Federal Power Commission*, 201 F.2d 183 (CADC 1952), *cert. denied*, 345 U.S. 934 (1953). However, the circuit court in that case, by relying upon *Wisconsin-Michigan Power Co. v. Federal Power Commission*, supra, as arising "upon strikingly similar facts," failed to note that the two cases were not in fact similar since the case which was relied upon related only to an initial wholesale sale at the state line, not to a subsequent sale.

II. IMPACT OF THIS CASE UNIQUELY NARROW

The sale by Edison to Colton is unique. It does not typify either the wholesale rates which counsel for FPC say are now on file with the Commission, nor is it similar to the sales for resale which FPC counsel say will be made from the envisioned nationwide power grid.

The sale by Edison to Colton is a sale of power whose interstate component, if any, derives from the Hoover Project, a source which is not only regulated as to rates by the Federal government under separate legislation, the Boulder Canyon Project acts, but which was built and is owned by the Federal government, and a portion of which is dedicated to California loads. Since Edison is the only company purchasing energy from the United States at Hoover and thereafter selling energy for use within a single state, the impact of the present decision may not extend beyond this one isolated situation.

Furthermore, the conclusion of the court could readily be sustained on any of three other independent grounds. One of these grounds, as noted by Colton in its petition here, is that the Boulder Canyon legislation can be determinative.

Neither FPC nor Colton disputes that, prior to the enactment of Part II of the Federal Power Act in 1935, jurisdiction to regulate the rates of sales by allottees (sales subsequent to the initial sale by the United States to such allottees) of electric energy generated at Hoover Dam was vested in the state where the sales occurred if such state had a regulatory agency, otherwise in the Secretary of the Interior. This was pursuant to Section 6 of the Boulder Canyon Project Act of 1928, 43 U.S.C. 617 e, which provided for such a method of regulation. Congress adopted this legislation subsequent to this Court's decision in *Attleboro* and despite the existence of the Federal Power Commission.

The only way which Colton has found to argue against the clear language of the Boulder Canyon legislation is to assert that such language was repealed by implication. But the Boulder Canyon Project Adjustment Act of 1940, 43 U.S.C. 618-618 a, enacted five years after Part II of the Federal Power Act, not only did not repeal the Boulder Canyon Project Act, but specifically amended portions of Section 6, *leaving intact* that portion authorizing regulation by the state (or alternatively the Secretary of the Interior if the state had no regulatory agency) to fix the rates charged by allottees for resale of energy. Again in 1956 Congress reaffirmed the validity and current effectiveness of the Boulder Canyon Project Act by enact-

ing the Colorado River Storage Project Act, 43 U.S.C. 620 h.

Consideration of the status of Hoover energy therefore cannot set a precedent applicable to other federally-generated power. Furthermore, Edison is the only company purchasing energy at Hoover and thereafter selling such energy for use within a single state. In short the presence of the Boulder Canyon legislation in this case has a two-fold significance: (1) it establishes that the FPC has no jurisdiction, regardless of other questions at issue; (2) it makes this case uniquely narrow in its significance.

Edison's sale to Colton is unique not only because the out-of-state energy, if any, involved in that sale comes from Hoover, but because of a number of other circumstances. One of these is that Edison's sale to Colton is a sale from facilities which are used by Edison for local distribution, thus raising the question whether the "local distribution" exemption of Section 201(b) applies. Another factor which sets this case apart is that the FPC staff and Colton were in fact unable to prove whether any part of the energy delivered to Colton actually came from the out-of-state source, and an affirmative answer could be reached only by conjecture.

Another unique feature of this case is that only a small fraction of the energy available to Edison for all its customers was from the out-of-state source, and even that fraction has decreased to virtually zero. No energy comes to Edison from that source any longer except under possible emergency conditions.

It follows that this is a peculiarly unsuitable case for the granting of certiorari and certainly does not justify

the petitioners' request for the determination by this Court of a question of statutory construction as broad as that which petitioners have propounded.

III. NO IMPACT ON ANY LAWFUL ADMINISTRATIVE PROGRAM OF FPC

FPC counsel assert that the decision below will have serious impact upon the Commission's regulatory program at a time when it appears that technological advances will greatly increase the incidence of sales of electric power in interstate commerce. Petitioner predicts that the test announced below will create confusion and "create a cloud upon the Commission's authority . . ."

Such is not the case. The prospective transactions of multi-state power pools referred to by petitioners bear virtually no resemblance to the present case where the sale in question has been preceded by a sale by the federal government and the public interest is adequately protected.[2] The test of whether a given sale for resale involves the interests of more than one state (and hence is essentially of national interest) can be simply and unambiguously stated: once there has been a federally-regulated sale for resale of energy which is to be consumed wholly within one state, subsequent sales of that energy within the state of ultimate consumption involve the interest only of that

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[2] In *Jersey Central Power & Light Co. v. Federal Power Commission*, 319 U.S. 61 (1943) this Court said at p. 71-72: "If intervening companies might purchase from producers in the state of production, free of federal control, cost would be fixed prior to the incidence of federal regulation and federal rate control would be substantially impaired, if not rendered futile".

state. This is an accurate description of the area left to the states by the *Attleboro* case and by Section 201(a) of the Federal Power Act.

Such a test is easily and readily applied.[3] It is a far simpler question than the tracing of power flows necessary to determine whether the sale is "in interstate commerce" as this very case demonstrates.

It follows from the foregoing that the decision below can in no way frustrate whatever designs FPC may have to assume legitimate regulation over any interstate power grid.

IV. THE DECISION OF THE LOWER COURT MAY BE UPHELD ON ANY OF FOUR INDEPENDENT GROUNDS

Aside from the ground properly utilized by the court below for holding the sale outside FPC's jurisdiction, three other grounds in support of the decision below were fully briefed and argued before the lower court and any one of them could have been utilized independently to sustain the court's holding. They are listed as questions presented, Nos. 2, 3 and 4. Thus a finding adverse to petitioners on any one of Nos. 1, 2, 3 or 4 would be sufficient to uphold the judgment below. A brief description of the three grounds not utilized by the lower court will be useful.

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[3]The "Hinshaw Amendment" to the Natural Gas Act, 15 USCA 717(c), uses a similar test in defining which sales for resale are of local interest and beyond the power of the Commission. Since 1954, the language of that amendment has required construction only once by the courts, and then only collaterally. See *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 265 F.2d 364, 367 n.2 (CADC 1959).

Ground 2. The Federal Power Commission is precluded from regulating the Edison-Colton sale by the provisions of the Boulder Canyon Project Act, 43 U.S.C. 617.

As set forth in Part II of this brief (pages 11-13), the Boulder Canyon Project legislation precludes FPC jurisdiction over the rates charged by Edison for subsequent sales of energy for consumption in California. Since California has a Public Utilities Commission with full regulatory power, since the contracts between Edison and the United States contemplated that Hoover energy was to be sold to Edison for transmission to, and resale in, California, and since Section 6 of the Boulder Canyon Project Act remains in full force and effect, and has in fact been reaffirmed by Congress on at least two occasions subsequent to enactment of Part II of the Federal Power Act (Boulder Canyon Project Adjustment Act of 1940, *supra*, and Colorado River Storage Project Act of 1956, *supra*), there is no legitimate ground for FPC's assertion that Part II of the Federal Power Act repealed Section 6 of the Boulder Canyon Project Act "by implication". Therefore, FPC jurisdiction is precluded.

Ground 3. The FPC's finding that out-of-state energy was delivered by Edison to Colton is not supported by substantial evidence in the record.

In finding that energy from Hoover Dam reached the City of Colton, the FPC relied solely on the fact of physical connection. The facilities which ultimately serve Colton are supplied from the 220 kv bus at Edison's Highgrove substation. There are four connections to that bus: (1) the transmission line from Hoover Dam via MWD lines to Hayfield and Edison lines to Highgrove; (2) a

transmission line from Edison's Etiwanda steam generating station; (3) a transmission line from Edison's Chino substation; and (4) connections to transformers which serve several thousand customers including Colton. Each of the first three connections may be supplying energy or receiving energy at a given moment. FPC found that Hoover energy from the first of these connections reaches Colton, relying on two alternative theories (R.852-854): first, that the Hoover connection (No.1, above) is located on the 220 kv bus adjacent to the transformer connections (No.4, above) so that ". . . when any energy from [Hoover] was being delivered to the 220 kv bus, it was necessarily supplying the requirements of . . . [Colton]." (R.853); second, that even if, at a given moment, the requirements of the transformers were greater than the supply available from the Hoover connection, this would produce a mixture of intrastate and Hoover energy whose proportions would obtain" . . . all the way to Colton." (R.853) FPC refused to consider the fact that the alternative intrastate sources (Nos. 2 and 3 above) were at all times adequate to meet Colton's requirements.

Neither of the two theories is supported by the evidence of record, which proves nothing more than physical connection. Under the test announced in *Jersey Central Power and Light Co. v. Federal Power Commission*, 319 U.S. 61, 65-66 (1943), connection alone is insufficient proof where there are alternative sources of supply, any one of which could have furnished the particular requirements of the resale customer. This ground was presented both to the Commission and the lower court. The decision below may thus be upheld because there is no substantial evidence

to support the allegation that the sale of energy to Colton was in interstate commerce.

Ground 4. The sale of electric energy to Colton is exempted from FPC jurisdiction by the "local distribution" exemption of Section 201(b) of the Act.

Section 201(b) of the Federal Power Act provides in part that:

> "The Commission . . . shall not have jurisdiction . . . over facilities used in local distribution . . ."

The Commission held (a) that the facilities used to make the Edison-Colton sale are not used in local distribution and (b) that, even if they were so used, the Commission has jurisdiction over a *sale* even though it may be made from exempt facilities. (R.854-856). The Commission's finding as to the status of Edison's facilities is not supported by substantial evidence. From the Highgrove 220 kv bus described above, a connection is made to a set of 220 kv/66 kv transformers. From the 66 kv side, lines supply the 66 kv/12 kv transformers at several of Edison's distribution substations in western San Bernardino County. From one of these distribution substations the energy is used to supply a feeder network of eight circuits which traverse the streets and alleys and property lines to serve several thousand local customers in and around Colton. Two of these circuits are used to supply the requirements of Colton as well as those of other customers.

If these facilities, used to serve thousands of customers at low voltage in a restricted area (see Exhibit 13, R. 732) are not local distribution facilities, then it is difficult

to imagine what types of facilities Congress had in mind. The Commission, however, held that the facilities are not local distribution facilities because they are used to make a wholesale sale. (R.855). This construction of the meaning of the proviso renders it mere surplusage, and ignores the holding of this Court that the local distribution clause must be given effect as an independent limitation on the Commission's jurisdiction. *Connecticut Light and Power Co. v. Federal Power Commission*, 324 U.S. 515, 531 (1945).

The Commission's alternative holding, that the exemption of local distribution facilities is irrelevant to the status of sales made from such facilities, is also erroneous. Jurisdiction over facilities may extend farther than jurisdiction over sales, but the converse cannot be true, because rate jurisdiction is confined by Sec. 205 and 206 to "public utilities", which are in turn defined by Sec. 201(e) as persons owning or operating jurisdictional *facilities*. The legislative history confirms that the Commission's view is erroneous:

> "As in the Senate Bill no jurisdiction is given over local distribution of electric energy, and the authority of the states to fix local rates is not disturbed even in those cases where the energy is brought in from another state." H.R.Rep. 1318, 74th Cong., 1st Sess. 27 (1935).

Because the decision of the lower court may be upheld on any of the four independent grounds discussed above, the additional issues raised below (see Questions Presented, Nos. 5-9) should not be reached for decision. While argument on the merits of additional issues is inappro-

priate at this time, the existence of subsidiary questions which would require court review illustrates the unsuitable nature of this case for the granting of certiorari.

CONCLUSION

For the foregoing reasons the petitions for writ of certiorari should be denied.

Respectfully submitted,

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